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Supreme Court of the United States

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ROBERT VERRAND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

- X

ROBERT VIGGIANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

- X

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, ROBERT VIGGIANO, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered November 18, 1970 (Docket No. 33212).

The judgment affirmed the conviction for possession of stolen goods (18 U.S.C. 659) after a jury trial in the Eastern District of New York 68 CR 454).

Opinion Below

The opinion of the Court of Appeals, not yet reported, is set forth as Appendix A.

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is granted pursuant to 18 U.S.C. 1254 (1).

Issue Presented

Did the Court of Appeals err, contrary to the constitutional standards of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), in upholding the issuance of a search warrant, where the hearsay information was furnished by a previously unreliable informant, and the FBI's own investigation in no way included an observation, or any knowledge of the defendant, or the premises, or the particular contraband involved?

Constitutional Provision Involved

The Fourth Amendment to the United States Constitution, prohibiting unreasonable search and seizure, is well known to members of this Court.

Preliminary Statement

Petitioner, ROBERT VIGGIANO, was convicted of one count of possession of stolen goods (18 U.S.C. 659). He was acquitted of conspiracy to so possess (18 U.S.C. 371). The remaining seven co-defendants, including his brother OLAN, were acquitted of both charges.

On appeal only the issue of the validity of the search and seizure, pursuant to a Commissioner's warrant, of brother OLAN's home, was raised

and considered. The search netted six cartons of stolen Russ Togs apparel, which was the corpus of the government's case.

The affidavit of FBI Agent PAUL STAPLETON was based very substantially on information given that very same day, October 24, 1968, by ALLAN MAGID, a person previously unknown to law enforcement officials. In the words of the Court of Appeals' Opinion — "a walk-in, with whom the FBI had had no experience before he came to the Bureau Office on October 24, 1968" (A2).

The opinion of the Court of Appeals, in summarizing MAGID's information to the FBI, which Agent STAPLETON inserted in his affidavit, states:

At page 369:

> "...in August, 1968, Robert Viggiano told Magid that he had just purchased a load of Russ Togs clothing which he wanted to resell for $17,000; that a month later one Vic Orena gave Magid a key to the garage at 245-02 South Conduit Boulevard, Queens, with the instructions to show the merchandise to prospective buyers; that Magid entered the garage October 22, 1968 and saw a quantity of boxes bearing Russ Togs labels, some of which bore out-of-state addresses, and a quantity of ladies' and children's wearing apparel, having Russ Togs labels; and that Magid had given Agent Stapelton the key to the South Conduit Boulevard garage.
>
> "They further stated that in early Oc-

> tober, 1968, Robert Viggiano told Magid he had received another Russ Togs load, and Viggiano showed Magid a quantity of boxes bearing Russ Togs labels with out-of-state addresses; that on October 7, 1968 Robert Viggiano told Magid that he had moved 'the load' to a storage room on the ground floor of his brother's home 'around the corner,' and that Magid knew that Allen Viggiano, Robert's brother, lived 'around the corner' at 9031 Farragut Road; that Robert Viggiano informed Magid on October 20, 1968 that the merchandise was still at the Farragut Road address and that Magid would be told when the shipment was moved elsewhere, but that Magid had not been so informed before reporting to the F.B.I."

At page 370:

The opinion of the Court of Appeals, in summarizing what the FBI knew on its own, which Agent Stapelton also inserted in his affidavit, states:

> "They also disclosed that by its own inquiries, the F.B.I. learned that a truck containing $36,000 worth of Russ Togs apparel consigned to out-of-state purchasers had been hi-jacked in Manhattan on August 20, 1968, that a motor carrier's depot had been burglarized September 30, 1968 and that a quantity of Russ Togs apparel, labelled for interstate shipment, had been stolen."

* * *

At pp. 370-372:

In upholding the search warrant against a defense contention that the Commissioner was not justified in concluding that the informer was credible and his information reliable, the Court of Appeals wrote:

> "... The detailed information reported by Magid, most of which was based upon his personal observation together with admissions made directly to him by the appellant, his own admissions as aider and abettor, his possession of the key to the garage, which he turned over to the F.B.I. and the corroboration of the outside information picked up by the F.B.I., such as the facts and dates of the hi-jacking and theft of the garments, the brand name of the items, the addresses to out-of-state consignees, the relative consistency of price (all things considered) between the manufacturer's invoices and appellant's purchasing and asking prices, all afford the kind and quality of evidentiary material that support and confirm the Commissioner's conclusion that the informant was generally trustworthy."

* * *

> "The affidavits also sufficiently report the 'underlying circumstances' which 'enable the magistrate independently to judge the validity of the informant's conclusion...' that the appellant was engaged in criminal activity. * * * The affidavits stated that Magid personally observed boxes of Russ

> Togs merchandise at both the South Conduit Boulevard address and in Robert Viggiano's garage. Although the affiant did not represent that Magid had seen the cartons at the Farragut Road address, he did allege that Robert Viggiano told Magid that the goods stored in his garage had been moved to the Farragut Road premises and that Magid would be informed if they were again moved. A man of reasonable caution could infer from these allegations that Magid had been accurately informed concerning the location of the stolen goods in order that he might facilitate the sale of those goods. The warrant applications plainly showed that Magid was relying 'on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Spinelli v. United States, supra at 416.

Reasons for Granting the Writ

The opinion of the Court of Appeals, in finding both credibility and reliability in the hearsay information furnished by the informed OLAN MAGID, is violative of the standards of this Court promulgated in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 419 (1969).

It is not disputed that MAGID was not previously reliable; he had never before given the FBI information, nor was he ever known to them. See Wong Sun v. United States, 371 U.S. 471, 480 (1963).[1]

1. The narcotic agents have no basis in experience for confidence in the reliability of Hom Way's information; he had never before given information.

Neither did the FBI ever observe any of the cartons, or any of the defendants, or the inside of any of the premises.

Except for MAGID's tip, the FBI had no information connecting Viggiano to the cartons, which had been alleged to have been stolen from Russ Tog. The FBI's independent knowledge of a prior theft in no way connected it to Viggino or his co-defendant, or to Viggiano's premises or that of his brother.

We are not dealing with hearsay information furnished by a previously reliable informer, or from a police officer, or even from an ordinary citizen. Nor are we dealing with hearsay information furnished by an informer who saw the defendant commit the crime of hi-jacking, or one who sold the stolen cartons to the defendant.

All we have is a hearsay statement from a not previously reliable source, that Viggiano exhibited cartons to Magid, and sought his assistance in disposing of the cartons.

The FBI's own investigation, which merely noted the fact of a Russ Tog theft some time in the past, in no way corroborates Magid's story implicating Viggiano with the fruit of that theft. The FBI had no independent knowledge of who was involved in the theft — in fact, Magid's story in no way involved Viggiano in the theft. Quite to the contrary — Magid's story was that Viggiano had told him he had purchased the cartons (A3). The FBI never attempted to corroborate Magid's statement, nor did they ever attempt to view the cartons (even though Magid claimed to have a key

to the premises), or the inside of the premises, or the defendants.

The FBI's own information was too limited to give assurance to the informant's reliability, and in no way corroborates the informant's representations, as required by Aguilar and Spinelli.

To date, this Court has never found probable cause based upon a statement from a not previously reliable informer, where the law enforcement officer did not himself observe either the defendant in question, or the contraband, or the premises. In our case, the Court of Appeals has relaxed the constitutional standards to a degree which does not afford reliability and trustworthiness. It is for this Court to resolve the issue now posed — can probable cause be found in a situation where the informer is not previously reliable, and the FBI agents have never observed the defendant, or the premises, or the contraband, and have no independent knowledge as to the defendants, or the premises, or the particular contraband.

The Court of Appeals credits the hearsay information of Magid because Magid's own statement of his conversations with Viggiano involve "his own admissions as aider and abettor" (A5). In this regard, the Court of Appeals relies on the concurring opinion of Mr. Justice White in Spinelli, 393 U.S. at 425. But Justice White concurred alone, and none of his colleagues joined him in attaching any significance to an informant's statement which may be an admission of his own complicity.[2] It is in order for this Court to look

2. In Wong Sun v. United States, 371 U.S. 471, 490 (1963), this Court agreed that probable cause was lacking for Wong Sun's arrest, even though co-defendant Toy, by his own statement which was an admission, implicated Wong Sun.

again at the issue, now that the Court of Appeals has chosen to utilize that factor in assessing probable cause.

Conclusion

The situation is indeed novel where probable cause was found from a hearsay statement of a not previously reliable informer, where law enforcement officials neither observed the contraband, or the defendant, or the premises, nor had any independent knowledge involving the defendant, or the premises or these particular cartons.

The writ of certiorari should be granted to determine whether the constitutional standards can be so drastically relaxed — especially so when Spinelli recently tightened the standards.

Respectfully submitted,

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Appendix "A"
Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 193—September Term, 1970.

(Argued October 7, 1970 Decided November 10, 1970.)

Docket No. 35212

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT VIRGIANO,

Defendant-Appellant.

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

Appeal from a judgment of conviction in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, on a charge of possession of stolen goods in violation of Title 18 U.S.C. §659. Affirmed.

JEROME LEWIS, Esq., New York, N. Y., *for Appellant.*

JAMES O. DRUKER, Special Att'y, Department of Justice (Edward R. Neaher, U. S. Attorney, Eastern District of New York, and Denis E. Dillon, Special Att'y, Department of Justice, on the brief), *for Appellee.*

Opinion

Anderson, *Circuit Judge*:

The appellant Robert Viggiano was convicted on a single charge of possession of stolen goods in violation of Title 18 U.S.C. §659 and was sentenced to five years imprisonment. At the trial the Government presented evidence which was the product of a search and seizure authorized by two search warrants issued by a United States Commissioner. The accused challenged the validity of the warrants on the ground that the supporting affidavits on which the Commissioner relied were insufficient to show probable cause. A motion to suppress was made in advance of trial; the court held a hearing on the motion and denied it. The defendant now appeals from the judgment of conviction because the trial court refused to exclude the evidence seized. We affirm.

The search warrants were based upon the affidavits of F.B.I. Special Agent Paul Stapleton and were issued on October 24, 1968. They authorized the F.B.I. agents to search the ground floor of a dwelling located on Farragut Road and occupied by Allen Viggiano, appellant's brother, and the garage attached to the premises at 245-02 South Conduit Boulevard, Queens. The agents executed the warrants the following day and seized six cartons of Russ Togs brand wearing apparel at the Farragut Road residence.

The F.B.I. learned of the stolen goods and their whereabouts through one Allen Magid, a "walk-in," with whom the F.B.I. had had no experience before he came to the Bureau offices on October 24, 1968. After interviewing Magid, the F.B.I. agents made a quick investigation of their own and Agent Stapleton prepared affidavits summarizing Magid's report and the results of the F.B.I.

inquiries. In substance the affidavits[1] gave the Commissioner the information that: in August, 1968 Robert Viggiano told Magid that he had just purchased a load of Russ Togs clothing which he wanted to resell for $17,000; that a month later one Vic Ocean gave Magid a key to the garage at 245-02 South Conduit Boulevard, Queens, with instructions to show the merchandise to prospective buyers; that Magid entered the garage October 22, 1968 and saw a quantity of boxes, bearing Russ Togs labels, some of which bore out-of-state addresses, and a quantity of ladies' and children's wearing apparel, having Russ Togs labels; and that Magid had given Agent Stapleton the key to the South Conduit Boulevard garage.[2]

They further stated that in early October, 1968, Robert Viggiano told Magid he had received another Russ Togs load, and Viggiano showed Magid a quantity of boxes bearing Russ Togs labels with out-of-state addresses; that on October 7, 1968 Robert Viggiano told Magid that he had moved "the load" to a storage room on the ground floor of his brother's home "around the corner," and that Magid knew that Allen Viggiano, Robert's brother, lived "around the corner" at 9031 Farragut Road; that Robert Viggiano informed Magid on October 20, 1968 that the merchandise was still at the Farragut Road address and that Magid would be told when the shipment was moved elsewhere, but that Magid had not been so informed before reporting to the F.B.I.

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1 The district court properly considered the allegations of both affidavits as if submitted in a single application. *United States* v. *Bevaso*, 367 F.2d 347, 348-50 (2 Cir. 1966), *vacated on other grounds*, 390 U.S. 202 (1968).

2 F.B.I. agents did not attempt to use this key to the South Conduit Boulevard garage before applying for the search warrants.

They also disclosed that by its own inquiries, the F.B.I. learned that a truck containing $36,000 worth of Russ Togs apparel consigned to out-of-state purchasers had been hijacked in Manhattan on August 20, 1968; that a motor carrier's depot had been burglarized September 30, 1968 and that a quantity of Russ Togs apparel, labelled for interstate shipment, had been stolen.

Appellant contends the warrants obtained on the basis of these allegations were issued without probable cause. In *Spinelli v. United States*, 393 U.S. 410 (1969), the Supreme Court discussed the constitutional standards to be applied in assessing the sufficiency of a warrant application containing not only an informant's report but also the results of an independent F.B.I. investigation which was said to corroborate at least a part of the informant's representations. The Court in that case reaffirmed the dual requirement of *Aguilar v. Texas*, 378 U.S. 108, 114 (1964), that the warrant application must state "some of the underlying circumstances" from which the informant drew his conclusions concerning the suspect's criminal activities and disclose some of the reasons which gave assurance of the informant's reliability.

In the present case the question is whether or not there was sufficient in the informant's report and the information gained by the F.B.I. in its outside inquiry, both as stated in the affidavits, to justify the Commissioner in deciding that the informant was generally trustworthy and that what the informant knew which led to his making the charge was obtained in a reliable way. *Spinelli v. United States, supra*, at 417.

We conclude that the affidavits were sufficient to justify a finding of probable cause for the issuance of the warrants. The detailed information reported by Magid, most of which

was based upon his personal observation together with admissions made directly to him by the appellant, his own admissions as aider and abettor,[3] his possession of the key to the garage, which he turned over to the F.B.I. and the corroboration of the outside information picked up by the F.B.I., such as the facts and dates of the hijacking and theft of the garments, the brand name of the items, the addresses to out of state consignees, the relative consistency of price (all things considered) between the manufacturer's invoices and appellant's purchasing and asking prices, all afford the kind and quality of evidentiary material that support and confirm the Commissioner's conclusion that the informant was generally trustworthy. See *Jones* v. *United States*, 362 U.S. 257, 269 (1960).

In *United States* v. *Rozza*, 365 F.2d 206 (2 Cir. 1966), for example, the affiant officer investigated the burglary of a New Jersey motor vehicle agency from which validating machines and license forms had been stolen. An informant turned over to the police stolen operators licenses he allegedly purchased from Kuhle. On the basis of this information a search of Kuhle's house was authorized. Rejecting the defendant's contention that the warrant was issued without probable cause, this court stated that "[t]he

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3 *See Spinelli* v. *United States*, 393 U.S. 410, 425 (1969) (White, J. concurring); *Ourso* v. *Rinfati*, 273 F. Supp. 428, 429 (D. Mass. 1967), *cert. denied*, 391 U.S. 969 (1968).

In *United States* v. *Gilbert*, 366 F.2d 923, 931 (9 Cir. 1966), the court found credible the report of a "fully confessed participant in the crime, mortally wounded and beyond expectation of personal benefit by incriminating the innocent." While Magid was apparently far from being in *extremis*, he does involve himself in his report as a peripheral participant in agreeing to aid and abet in disposing of the stolen goods. While not conclusive on the matter of Magid's trustworthiness, it is something the Commissioner was entitled to consider, because it is more unusual than not that a man would recount his involvement in criminal activity when in fact there was no such criminal activity.

identity of the licenses found on [the informant] with those known [by the affiant] to have been stolen was a far stronger reason for believing [the informant] than a record of an informer's previous reliability." See *United States* v. *Wood*, 270 F. Supp. 963, 967 (S.D.N.Y. 1967).

The affidavits also sufficiently report the "underlying circumstances" which "enable the magistrate independently to judge of the validity of the informant's conclusion . . ." that the appellant was engaged in criminal activity. The above mentioned items of information are relevant also to this portion of the test standard. Particular weight should be given to matters within the informant's own observation and hearing. In *Spinelli* the Supreme Court gave recognition to personal observation as a reliable basis for an informant's report. 393 U.S. at 416. The affidavits stated that Magid personally observed boxes of Russ Togs merchandise at both the South Conduit Boulevard address and in Robert Viggiano's garage. Although the affiant did not represent that Magid had seen the cartons at the Farragut Road address, he did allege that Robert Viggiano told Magid that the goods stored in his garage had been moved to the Farragut Road premises and that Magid would be informed if they were again moved. A man of reasonable caution could infer from these allegations that Magid had been accurately informed concerning the location of the stolen goods in order that he might facilitate the sale of those goods. The warrant applications plainly showed that Magid was relying "on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli* v. *United States*, *supra* at 416.

The judgment of the district court is affirmed.